

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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JUN -7 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2009-0343
)	DEPARTMENT B
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
PEDRO ROLANDO LOZANO,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20090217-002

Honorable Richard S. Fields, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Kathryn A. Damstra

Tucson
Attorneys for Appellee

Barton & Storts, P.C.
By Brick P. Storts, III

Tucson
Attorneys for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Following a four-day jury trial, appellant Pedro Lozano was convicted of first-degree burglary, a class two felony; aggravated robbery, a class three felony; kidnapping, a class two felony; armed robbery, a class two felony; and two counts of aggravated assault with a deadly weapon/dangerous instrument, class three felonies. All of these offenses were dangerous in nature. The trial court sentenced Lozano to concurrent, slightly mitigated and presumptive prison terms, the longest of which was nine years, with credit for seventy-eight days served. The court also ordered Lozano to pay restitution in the amount of \$9,990. On appeal, Lozano contends he was denied his constitutional right to a unanimous verdict when the court substituted an alternate juror without instructing the jury to begin deliberations anew. For the reasons set forth below, we affirm.

¶2 Because Lozano has not presented any arguments challenging the factual basis for his convictions on appeal, we provide only a brief summary of the events leading to those convictions. We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the jury's verdicts. *See State v. Jeffrey*, 203 Ariz. 111, ¶ 2, 50 P.3d 861, 862 (App. 2002). So viewed, the evidence established that Lozano and two accomplices participated in an armed home invasion in January 2009. During the incident, Lozano and his co-defendants entered the victims' home, held one victim at gunpoint, and demanded to know where the victim's guns were located. Lozano hit another victim over the head with a piece of wood, after which that victim displayed a

gun, and Lozano and his co-defendants fled. Police apprehended Lozano shortly after the incident occurred.

¶3 Just before the jury retired to begin deliberations, the trial court selected an alternate juror by lot, as required by Rule 18.5(h), Ariz. R. Crim. P. Before excusing the alternate juror, R., the court explained that he could be called back if another juror were unable to continue with deliberations; the court also retained R.'s notes and admonished him not to discuss the case with anyone. The jury retired at 3:50 p.m. and was excused for the weekend at 5:00 p.m. On the following Tuesday morning, one of the jurors, H., notified the court that she was unable to return due to an emergency; the court notified R. that he was needed to deliberate. Twelve jurors, including R., resumed deliberations at 9:15 a.m. and reached their verdicts at 11:03 a.m. Immediately before the jury returned to announce the verdicts, the court made the following statement in the presence of counsel and Lozano: "And just for the record, apparently [H.] had a problem medically last night, called [the bailiff] this morning and indicated that she couldn't attend today. And we had to call in [R.] as the alternate to continue deliberations." After the jury returned its verdicts, the court polled each juror by number, and each one confirmed his or her verdicts.

¶4 Rule 18.5(h), entitled "Selection of Jury," addresses substituting a juror after deliberations have begun and provides in relevant part: "If an alternate [juror] joins the deliberations, the jury shall be instructed to begin deliberations anew." In this case, the jury had not been instructed prior to its deliberations how to proceed in the event it

had to be reconfigured after deliberations had begun, and the record is silent as to what the jury was told about R. replacing H. and how it should proceed in H.'s absence. Based on the record's silence and the "length of the deliberations after [R.] joined the jury," Lozano concludes that the trial court did not instruct the jury properly and that the jurors did not begin deliberations anew after R. joined them. He contends that, because the court never gave the required instruction, and because the jurors did not, in fact, begin deliberations anew after R. joined them, he was denied the right to a unanimous verdict. *See* Ariz. Const. art. II, § 23. He thus claims he is entitled to a new trial.

¶5 But Lozano failed to raise this objection in a timely fashion. Nor has he argued on appeal that fundamental, prejudicial error occurred. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) (when defendant fails to object to alleged error in trial court, appellate court reviews solely for fundamental error). Therefore, we find his argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (defendant's failure to assert fundamental nature of alleged error, to which he did not object below, waives argument on appeal).

¶6 At any rate, the record does not necessarily indicate the trial court failed to instruct the jury as required by Rule 18.5(h). Although it would have been better if the record had shown what the court told the jurors when R. joined them, the absence of such a record does not prove the jury was not instructed properly. Nor can we overlook that the court presumably would have provided a record had counsel raised a timely inquiry into the contents of the judge's instructions at the time of the substitution. And, to the

extent we lack such a record, we must presume a trial judge knows the law, including the requirements of Rule 18.5(h), and that he followed it. *See State v. Medrano*, 185 Ariz. 192, 196, 914 P.2d 225, 229 (1996). Thus, even were we to overlook Lozano's waiver of the claim, we would find no error, fundamental or otherwise.

¶7 We affirm the convictions and sentences imposed.

/s/ *Peter J. Eckerstrom*

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ *J. William Brammer, Jr.*

J. WILLIAM BRAMMER, JR., Judge

/s/ *Garye L. Vásquez*

GARYE L. VÁSQUEZ, Judge